SUPREME COURT, U.S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-5601

JOHN GEORGE LEDES,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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TO THE HONORABLE, *The Chief Justice and Associate Justices of the Supreme Court of the United States*:

Petitioner, John George Ledes, an attorney, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered on June 24, 1971, affirming the judgment of the United States District Court for the District of Columbia, entered on a plea of *nolo contendere* to the indictment, wherein petitioner was sentenced to imprisonment for a term of one to four years, the execution of such sentence being suspended and placing petitioner on probation for four years.

Opinions of the Courts Below

The Court of Appeals rendered no opinion in this case. The judgment of the Court of Appeals was entered on

June 24, 1971. It is printed in Appendix "C", hereto, *infra*, p. 33. The District Court for the District of Columbia did not render any opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on June 24, 1971. On September 14, 1971 the Chief Justice "[o]rdered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including October 21, 1971 (Appendix "D", *infra*, p. 35). The jurisdiction of this Court is invoked under Title 28 U. S. C. §1254(1).

Questions Presented

1. May a defendant be constitutionally subjected to the jeopardy of a second trial where he was once put on trial before a jury for the same offense and, without "imperious necessity" or his request or consent, a mistrial was abruptly declared, solely as a result of the misconduct of the United States Attorney, which was prejudicial to a co-defendant, but not as to the petitioner?

2. Does a delay of four years and three months in the trial of a defendant occasioned by the Government's repeated refusal to comply with the discovery order of the District Court requiring the Government to provide defendant with copies of numerous Government documents vital to defendant's defense, and during such period of time many of such documents, in the exclusive custody and control of the Government have either been "destroyed" or "disappeared" and three witnesses vital to defendant's defense have died, violate petitioner's right to a Speedy Trial under the Sixth Amendment?

3. Does a defendant's plea of *nolo contendere* entered as a result of a delay of four years and three months during which period of time evidence vital to his defense, in the exclusive possession of the Government has been "destroyed" and "disappeared" and three witnesses vital to his defense have died, thereby depriving him of a "fair trial" and after his constitutional pleas of Double Jeopardy and failure to receive a Speedy Trial had been rejected, waive petitioner's right to raise such constitutional issues before the Supreme Court?

Constitutional Provisions Involved

The constitutional provisions involved are the Fifth Amendment "* * *; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, * * *" and the Sixth Amendment "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * *".

Statutory Provisions Involved

The pertinent statutory provisions are printed in Appendix "A", *infra*, p. 26.

Statement of the Case

On January 18, 1961, a one-count indictment was returned charging petitioner, while a legal assistant to a member of the Securities and Exchange Commission, and two co-defendants, Abrams and Gordon, with violation of 18 U. S. C. §371 (Appendix "A", *infra*, p. 26). The alleged conspiracy, in essence, was that they and others had knowingly, willfully and unlawfully conspired to defraud the United States, (a) concerning its right to

have the business and affairs of the Securities and Exchange Commission administered free from self-interest, bias and improper influence, more particularly with respect to matters and proceedings concerning several named companies, and (b) concerning its right to the impartial, unbiased and conscientious actions and judgments of petitioner as an employee of the Commission, free from corruption, partiality, improper influence, bias and dishonesty. It was alleged that as a part of the conspiracy he rendered improper assistance both to said companies in matters "pending before the Commission" and to Abrams, who was a subject of investigation in regard to matters of a certain corporation "pending before the Commission". No substantive count was alleged in the indictment.

The first trial began on January 8, 1962 and ended in a mistrial as to all of the defendants on January 9, 1962, solely as a result of the misconduct of the United States Attorney which prejudiced the defendant Abrams, but which did not prejudice petitioner and the other co-defendant. Immediately thereafter, on January 9, 1962, a new jury was sworn and a second trial began. Petitioner's motion to dismiss the indictment at the commencement of the second trial on the grounds of Double Jeopardy was denied. The second trial ended in a verdict of guilty for the petitioner and his two co-defendants on February 1, 1962. Petitioner was sentenced on April 13, 1962 to a term of one to three years.

On April 13, 1962 an appeal was taken to the United States Court of Appeals for the District of Columbia who reversed the judgment on January 2, 1964 and remanded the case for a new trial (*Abrams* v. *United States*, 327 F. 2d 898, Appendix "B", *infra*, p. 27). In its opinion the Court of Appeals rejected petitioner's claim of Double Jeopardy under the Fifth Amendment but reversed the

conviction on the grounds that the Government had introduced evidence which made "serious charges of wrongdoing and unlawful conduct by Abrams" which it held to be "highly prejudicial" at least to petitioner, and Abrams (Appendix "B", *infra*, pp. 30, 31, 32).

After delays of four years and three months occasioned by the Government's repeated refusal to comply with the discovery orders of the District Court requiring the Government to provide petitioner with copies of numerous documents vital to petitioner's defense, and after the denial by the District Court of petitioner's motions, first to dismiss the indictment for the failure of the Government to furnish such vital documents and the deprivation of petitioner's constitutional right to a "speedy trial" under the Sixth Amendment and then his motion for an immediate trial, and as a result of the oppressive harassment of the petitioner by the Government, by successive, oppressive prosecutions, the petitioner being in dire financial straits and faced with a thirty day trial and unable to defend himself as a result of the death of numerous witnesses and the refusal of the Government to furnish the ordered documents vital to his defense, many of which documents the Government admitted were either "destroyed" or "unavailable" since the second trial, the petitioner had no choice but to enter a plea of *nolo contendere* to the indictment on March 11, 1968. On June 7, 1968, petitioner was sentenced to imprisonment for a term of one to four years but execution of that sentence was suspended and he was placed on four years probation.

Petitioner appealed to the United States Court of Appeals for the District of Columbia, who affirmed the judgment, without opinion on June 24, 1971 (Appendix "C", *infra*, p. 33).

Reasons Relied on for Granting the Writ

This case presents questions never before submitted to this Court, whose resolution is vital to the administration of justice in the Federal Courts. Of primary significance are the questions as to the scope of the constitutional inhibition against double jeopardy in cases of retrial after an earlier declaration of mistrial as a result of misconduct on the part of the United States Attorney and of his subsequent acts in delaying a new trial to the petitioner for over four years, in spite of the constitutional right of the petitioner to a speedy trial, and in spite of petitioner's futile efforts to seek a speedy trial, which was denied him by the District Court. Of great significance is the question of whether or not a plea of *nolo contendere* made after a defendant's constitutional pleas of double jeopardy and failure to receive a speedy trial have been rejected, waive the right to raise such constitutional issues before the Supreme Court.

I

Double Jeopardy

There is first the important question whether a defendant in the Federal Courts may constitutionally be subjected to the jeopardy of a second trial, and in this instance a third trial, where he was once put to trial before a jury for the same offense and, without "imperious necessity" or his request or consent, a mistrial was abruptly declared, solely as a result of the misconduct of the United States Attorney, which was prejudicial to a co-defendant, but not to the petitioner.

From *United States* v. *Perez,* 22 U. S. (9 Wheat.) 579, decided in 1824 to *Gori* v. *United States,* 367 U. S. 364,

decided in 1961 this Court has held that there are occasions when a second trial may be had although the jury empaneled for the first trial was discharged without reaching a verdict and without the defendant's consent. The classic example is a mistrial because the jury is unable to agree as this Court held in *Perez*. However, in the *Perez* case Mr. Justice Story pointed out that "the power [to declare a mistrial] ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes" [1] and in a later case he pointed out that the discretion to discharge the jury before it has reached a verdict is to be exercised "only in very extraordinary and striking circumstances".[2]

In *Gori*, Mr. Justice Douglas said:

> "Once a jury has been empaneled and sworn, jeopardy attaches and subsequent prosecution is barred if a mistrial is ordered—absent a showing of imperious necessity. * * * The prosecution must stand or fall on its performance at the trial. I do not see how a mistrial directed because the prosecutor has no witnesses is different from a mistrial directed because the prosecutor abuses his office and is guilty of misconduct." [3]

It is true that the foregoing statement of Mr. Justice Douglas comes from the four member dissenting minority, but the majority in *Gori* does not question the soundness of the principles announced by Mr. Justice Douglas, which became the majority holding of this Court in 1963 in *Downum* v. *United States*, 372 U. S. 734, *infra*. The

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[1] 9 Wheat. at page 580.

[2] *United States* v. *Coolidge*, 25 Fed. Cas. 622, 623.

[3] 367 U. S. at 371, 372.

majority in *Gori* went off on the grounds that the order of mistrial there was "the product of the trial judge's extreme solicitude—an overeager solicitude, it may be—in favor of the accused" and inferentially the "over-eager solicitude" of the trial judge *in favor of the accused* constituted "imperious necessity".[4] How different the controlling facts in *Gori* were from the facts of this case!

Mr. Justice Douglas obviously assumed that the entire Court would agree that "a mistrial directed because the prosecutor abuses his office and is guilty of misconduct"[5] would make valid a plea of double jeopardy and yet this is exactly what happened in this case. Mr. Justice Frankfurter speaking for the majority in *Gori*, however, held that the double jeopardy safeguards of the Fifth Amendment apply in "cases in which the defendant would be harrassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution at a trial in which its case is going badly, by affording it another more favorable opportunity to convict the accused",[6] and yet again this is exactly what happened in this case.

In 1963 this Court decided the landmark case of *Downum* v. *United States, supra,* where this Court for the first time reversed a trial judge in exercising his discretion to declare a mistrial. Mr. Justice Douglas speaking for the majority of this Court in words strikingly similar to his dissent in *Gori* held that the granting of a mistrial because of a brief delay due to the absence of a government witness was improper and reversed a subsequent conviction of the defendant on the grounds of double jeopardy. You held

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[4] 367 U. S. at 367.

[5] 367 U. S. at 372.

[6] 367 U. S. at 369.

that the interests of defendants in avoiding the hardships of multiple adjudications required that mistrials be declared only in cases of "imperious necessity"[7] and concluded that "[w]e resolve any doubt in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion."[8]

In *Downum* you stated, relying upon *Gori*[9] at 372 U. S. 736 that

> "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches."

which is exactly what has happened in this case.

During the first trial herein the Government's case had been going badly from the very beginning.[10] During the

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[7] 372 U. S. 736.

[8] 372 U. S. 738; *United States* v. *Watson*, 28 Fed. Cas. 501.

[9] 367 U. S. at 369.

[10] An example of this is the fact that during his opening statement the United States Attorney failed to allege that petitioner "in conspiracy with [the other defendants]; interfered with or obstructed one of the lawful government functions by deceit, craft, trickery or chicanery, or at least by means that are dishonest". Petitioner's attorney moved "for a judgment of acquittal based on the Government's opening statement."

> The Court: I don't think you understand counsel's point. He says in your opening statement that you haven't alleged to the jury that you would prove that these acts took place for the purpose of influencing this Governments employee's conduct.
>
> Mr. Matlack (United States Attorney): Well, that is what he tried to do.
>
> The Court: You haven't told the jury that is what you intended to do.

(footnote continued on next page)

second day of the trial the Government called as its fourth witness the Grand Jury reporter who was to read petitioner's grand jury testimony from his stenographic notes. The following then occurred:

> Mr. Matlack: The next witness I am going to use is the reporter who took testimony in the Grand Jury. I want to introduce certain testimony given by Mr. Ledes.
>
> There is one paragraph I want to eliminate. I want to bring it to the attention of counsel. I instructed the reporter not to read it from his notes. I thought at this time maybe I ought to show it to defense counsel.
>
> • • •
>
> Mr. Matlack: The next sentence, please leave out and that other part that I gave you to leave out.
>
> Start where it says, "I said".
>
> The Witness (Reading): "I said, 'A lot of people who sat around the table at the Last Supper were felons in their time and I won't hold that against you [referring to defendant, Abrams], but I don't want to have you and myself investing in any situation, if anything, for your sake'."

At the conclusion of the witnesses' testimony defendant Abrams' counsel moved for a mistrial on behalf of Abrams *only* although he also represented the other co-defendant,

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(footnote continued from previous page)

> Mr. Matlack: I thought I did. May I then do so?
>
> The Court: You may. The Court will permit counsel to reopen his opening statement.

The United States Attorney then proceeded to read the indictment to the jury, thereby creating a most unfavorable impression upon the jury as to the substance and conduct of the Government's case.

Gordon, on the ground that the United States Attorney deliberately and intentionally introduced testimony to show that Abrams was a felon, having been convicted of a crime. This testimony by the witness was not accidental or inadvertent error, since he did not testify with respect to the part that the United States Attorney wanted deleted, but testified to the part that the United States Attorney wanted included to create in the minds of the jury the fact that Abrams was a "felon" and had been "convicted of a crime", clearly misconduct on the part of the United States attorney, and prejudicial to Abrams, but not to petitioner or the other co-defendant, Gordon. The Court, finding such statement prejudicial to the defendant Abrams, granted his motion for a mistrial, and *sua sponte* declared a mistrial as to petitioner and Gordon, who were clearly not prejudiced by such statement, and who were not afforded an opportunity to object or consent to a mistrial as to themselves. The colloquy immediately preceding the declaration of mistrial appears below.[11]

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[11] Mr. Matlack: That is all I have of the witness, Your Honor.

Mr. Singer (Abrams' and Gordon's attorney): Now, may I approach the Bench, Your Honor?

The Court: You may.

(At the Bench:)

Mr. Singer: I may have misheard the witness but I will try to quote him as I wrote him down. Earlier in the reading, the witness said, "A lot of the people who sat around the table were felons in their times"——

The Court: "Around the table at the Last Supper" is what the witness said.

Mr. Singer: "At the Last Supper—and I would not hold that against you." And I say now I am compelled to move for a mistrial and the withdrawal of a juror upon the ground that through this witness in this fashion, the Government has gotten before this jury the fact that my client was convicted of a felony.

Now, I am going to point out to Your Honor that immediately prior to this expression was the part that had been deliberately

(footnote continued on next page)

Unquestionably the statement made by the witness at the deliberate behest of the United States Attorney was prejudicial to Abrams. Whether the mistrial as to Abrams, which was of "imperious necessity" as a result of prejudice which the United States Attorney knowingly created, subjected him to Double Jeopardy at the subsequent retrial is a question that this Court need not answer.

However, there was no "imperious necessity" to declare a mistrial as to petitioner and his co-defendant, Gordon,

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(footnote continued from previous page)

deleted—that was, that Abrams had been convicted of a crime—so that this was no accidental situation. I was shown this portion up to the end of the fact that Abrams had been convicted of a crime. The earlier part had mentioned about Abrams having tax trouble and that was stricken. This part, I was not shown and I say, Your Honor, this is highly prejudicial to the defendant.

The testimony certainly could not be offered against Abrams; it has nothing to do with the case. The whole situation is absolutely immaterial. The conversation itself was a conversation about real estate. It doesn't prove a conspiracy. It only had one purpose as far as I am concerned and that is to get in the record that Abrams was a felon.

On those grounds, I am compelled to move for a mistrial and the withdrawal of a juror.

The Court: Mr. Matlack.

Mr. Matlack: There was nothing in the testimony read by this witness which said that Mr. Abrams was a felon, nor was there any indication that he was.

I would like to get my book if I may. I left it on the table.

The Court: Very well.

Mr. Matlack: * * * That is not saying he said he was a felon; it has nothing to do with saying that Mr. Abrams was a felon. * * * *I don't see anything in there that is prejudicial.*

I showed the transcript to Mr. Singer and he showed me the part he wanted deleted. If he didn't read that part, that is not because I didn't show it to him.

The Court: That is not the point. I think the question is as to whether or not *this statement is prejudicial to the defendant Abrams* at the present time. I believe this statement is prejudicial.

The Court will grant the motion for a mistrial. However, we will send for a new panel of jurors immediately and start the retrial of this case this morning.

who clearly suffered no prejudice as a result of the statement indicating that Abrams was a felon and the trial properly should have been continued as to them. The Court should have severed the trial as to Abrams and continued it against petitioner and Gordon, since the statement was prejudicial only as to Abrams and did not in any way prevent a fair trial from continuing against petitioner and Gordon. Such statement not being prejudicial to petitioner and Gordon was not proper grounds for declaring a mistrial as to them. Thus, there was no "imperious necessity" in declaring a mistrial as to petitioner and Gordon and such mistrial as to them violated the Double Jeopardy Clause of the Fifth Amendment. The financial and psychological strain on petitioner caused by an additional trial, continued restraint of liberty without certainty as to the outcome, the danger of evidence becoming unavailable or becoming unreliable through delay, and the additional opportunity for the Government to exercise its power to deprive petitioner of life or liberty, all of which actually occurred in this case justified dismissal of the indictment, as a result of the delberate prosecutorial misconduct, designed to prejudice the jury.[12]

The action of the trial court in declaring a mistrial as to the petitioner and his subsequent retrial subjected him to Double Jeopardy in violation of the Fifth Amendment.[13] This is especially true since the "mistrial [was] directed because the prosecutor [abused] his office and [was] guilty

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[12] 82 Harvard Law Review 1752 (1969).

[13] *Green* v. *United States,* 355 U. S. 184, 187, 188, 1957; *Benton* v. *Maryland,* 395 U. S. 784, 794, 1969, where you held that "the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty."

of misconduct" [14] and "[t]he prosecutor should certainly not benefit from prejudice which he himself has created." [15]

At the beginning of the second trial resulting in the conviction of all three defendants, petitioner moved to dismiss on the grounds of Double Jeopardy. However, his motion was denied. The Court of Appeals found no basis for reversal on the grounds of Double Jeopardy, but reversed and ordered a new trial as to all of the defendants "for the erroneous admission in evidence of Government Exhibit No. 14" which made "serious charges of wrongdoing and unlawful conduct by Abrams" which the Court of Appeals held to be "highly prejudicial" at least as to petitioner and Abrams [Appendix "B", *infra*, pp. 30, 31, 32]. Again the Government was able to benefit from prejudice that it created, thereby constituting harassment "by successive oppressive prosecutions" which this Court held in both *Gori* and *Downum* violated the Double Jeopardy safegards of the Fifth Amendment.

This Court is now presented for the first time with the question of whether prejudice to one of several co-defendants created by deliberate and intentional acts on the part of the prosecutor, but not prejudicial to the other defend-

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[14] *Downum* v. *United States*, 367 U. S. at 372 (Mr. Justice Douglas).

[15] *Carsey* v. *United States*, D. C. Cir., 392 F. 2d 810, 812, 1967. decided four years after the Court of Appeals had overruled petitioner's claim of Double Jeopardy after his subsequent conviction, thereby creating a conflict within the Circuit, best explained by the fact that this case was argued prior to your decision in *Downum*. In *Carsey* the Court of Appeals held that misconduct on the part of the defense attorney was not such "imperious necessity" warranting a mistrial and reversed defendant's conviction at the second trial on the grounds of Double Jeopardy, clearly indicating that if the prejudice had been caused by the prosecutor that would have even been more of a reason for reversing a subsequent conviction on the grounds of Double Jeopardy.

ants, resulting in a declaration of a mistrial as to all of the defendants, violates the Double Jeopardy prohibition of the Fifth Amendment, upon a subsequent retrial.

II

Failure to receive a speedy trial.

There is then the important question of whether a delay of four years and three months, after the Court of Appeals had reversed the conviction of petitioner and his co-defendants and ordered a new trial, occasioned by the Government's repeated failure and refusal to comply with the discovery orders of the District Court requiring the Government to provide petitioner with copies of numerous Government documents vital to petitioner's defense, and during such period of time many of such documents in the exclusive custody and control of the Government had either been "destroyed" or "disappeared" by the Government's own admission, and at least three witnesses vital to defendant's defense had died, violated petitioner's right to a speedy trial under the Sixth Amendment.

In *Klopfer* v. *State of North Carolina*, 386 U. S. 213, 1967, you held "that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment" and "has its roots at the very foundation of our English law heritage". You further stated that "[t]he history of the right to a speedy trial and its reception in this country clearly establish that *it is one of the most basic rights preserved by our Constitution*" (386 U. S. at 223, 226). [Emphasis supplied.]

Previously, in *Pollard* v. *United States*, 352 U. S. 354, 1957, you held 352 U. S. at 361 that "[w]hether delay in completing a prosecution such as here occurred amounts

to an unconstitutional deprivation of rights depends upon the circumstances" and that "*[t]he delay must not be purposeful or oppressive*", and yet this is exactly what happened in this case.

During 1964, 1965 and 1966 the case was repeatedly adjourned either as a result of Abrams' unavailability or Gordon's illness. Petitioner did not join in these applications for continuances, but as a result of the nature of the conspiracy alleged in the indictment he could not oppose such adjournments, nor could he compel the Government to proceed to trial.[16]

Finally, on January 17, 1967, with the trial imminent, the Government agreed to furnish to petitioner copies of government documents vital to his defense, many of which documents the Government knew contained evidence favorable to petitioner and could well establish his innocence of the crime for which he was indicted. However, the Government failed to honor its undertaking, made to both the petitioner and the District Court and failed to furnish any of these vital documents—the Government's purposeful campaign of oppression and harassment against the petitioner had now begun in earnest.

On April 7, 1967 petitioner moved before the District Court, pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure (Appendix "A", *infra*, p. 26), to compel the Government to produce such documents and on

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[16] A typical example of the dilemma faced by petitioner was pointed out by Chief Judge McGuire on May 9, 1966 when he adjourned the trial until October 24, 1966 and stated that

> "[n]ow, the Abrams matter will be out of the way by that time, and Mr. Gordon could recover and then he faces this situation which is very serious and *you can't force Ledes to trial without Gordon and you cannot sever*, as I view it." [Emphasis supplied]

May 10, 1967 Judge Burnita Matthews directed the Government to furnish to petitioner 16 of the 29 groups of documents vital and material to his defense. By July 19, 1967 none of such documents had been furnished to petitioner, yet the Government moved to suppress six of the items ordered produced by the District Court. After a hearing on August 25, 1967, Judge Matthews on September 5, 1967 denied the motion of the Government, except as to one of the items and again directed the Government to produce the other 15 groups of documents.[17] At the hearing before Judge Matthews the Government for the first time advised both petitioner and the District Court that many of the documents ordered discovered had either been "destroyed" or had "disappeared". By October 26, 1967, the Government had either failed or refused to furnish most of the documents as directed by the District Court.[18]

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[17] By this time petitioner was the only defendant left in the case—Abrams having pleaded guilty and received a prison sentence to run concurrently with one he was already serving and Gordon, being seriously ill, had on September 1, 1967 entered a plea of *nolo contendere* and received a one year suspended sentence.

[18] On September 5, 1967 the Government had made a small group of the documents available for petitioner's inspection, but refused to furnish copies to petitioner or make reasonable arrangements for petitioner to make copies at his own expense. In spite of Judge Matthews' orders of May 10 and September 5, 1967 to furnish such documents which contained evidence favorable to the petitioner, the Government either refused to furnish such documents or claimed they were either "destroyed" or had "disappeared". Included among these documents were the Securities and Exchange Commission visitors log book for the period of time that petitioner was an employee; subpoenas on petitioner's home telephone; minutes of meetings of the Commission and staff memoranda relating to matters "pending before the Commission" upon which the indictment was based; most of the telephone slips relating to petitioner and his office while an employee; names of Commission employees who were examined by its staff with respect to this case and the diary of a Commission employee who testified for the Government during the second trial. All of these documents contained evidence favorable to petitioner and were material to his guilt or innocence.

On October 26, 1967, petitioner moved to dismiss the indictment on the grounds that the Government deprived him of his constitutional right to a speedy trial under the Sixth Amendment and of due process of law under the Fifth Amendment by its refusal and failure to comply with Judge Matthews' orders to produce the documents. The Clerk of the Court did not make the motion to dismiss the indictment returnable until December 1, 1967, five weeks later. In the interim, on November 8, 1967, the case came before Chief Judge Edward M. Curran, who when advised of the motion to dismiss the indictment and the failure of the Government to produce the ordered documents, ordered that unless the Government complied with the discovery order "the case will be dismissed".[19] On December 1, 1967, District Judge Howard F. Corcoran summarily denied petitioner's motion to dismiss the indictment in spite of the Government's failure to comply with the discovery orders and in spite of Chief Judge Curran's order that "the case will be dismissed" unless the Government gave petitioner the documents, which the Government had failed to do.

On December 5, 1967, the Government made several more of the documents available, but refused to furnish facilities to petitioner to make copies or release them for such purpose, and by this time even more of the ordered docu-

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[19] Chief Judge Curran ruled as follows:

> The Court: * * * You have a motion to dismiss pending.
> Mr. Ledes: Yes, Your Honor.
> The Court: I am not going to do anything until that motion has been ruled on because *if the Department hasn't complied with the order the case will be dismissed.*
> Mr. Ledes: Your Honor, in that case I have five or six—no, about ten letters I need for exhibits. They won't give them to me.
> The Court: *Well, if they won't give them to you, the case will be dismissed.*

ments were "missing" or "destroyed". As a consequence thereof petitioner moved for reargument of his motion to dismiss the indictment, which was summarily denied by Judge Corcoran on January 5, 1968, who set the trial date for March 11, 1968. In view of his desperate financial situation petitioner then moved the District Court for an immediate trial, which was also summary denied by Judge Corcoran.[20]

By March 11, 1968, the date scheduled for the trial of this case, three witnesses vital to petitioner's defense had died.[21] In spite of all these obstacles and deprived of his constitutional rights to a speedy trial and due process, most of the documents ordered, never having been produced by the Government, petitioner appeared in Washington on March 11, 1968 prepared to proceed to trial, only to be advised that the District Judge assigned to try the case was ill and that it would have to be adjourned for at least another month. What was petitioner to do? He could not get a trial, speedy, or otherwise; his witnesses were dead; he had been deprived of due process by the Government's failure to comply with the discovery orders of the District Court; the District Court had denied his motions to dismiss the indictment on such grounds; he was faced with a 30 day trial at some unforseeable future date; his bank balance was below $300.00; his mort-

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[20] Both the Government and the District Court had been well aware for some time of the desperate financial straits of the petitioner, causing him to dismiss his attorney and appear *pro se*. The oppression and harassment of the Government had already cost him $3.500.00 in his futile attempt to compel the Government to comply with the discovery orders of the District Court.

[21] Gansen Pursel, counsel to Abrams in one of the matters which the indictment alleged was "pending before the Commission"; F. Bourne Upham, petitioner's direct administrative superior while he was employed at the Commission; and Harold Lese, who had been chief of the Branch of Small Issues of the Commission.

gage was in default; his wife and four children were without funds and the insurmountable agony, oppression and harassment for the last eight years was affecting his wife whose devotion through this period remained petitioner's great strength. He reluctantly accepted the Government's suggestion to enter a plea of *nolo contendere,* on its assurance that this would end all interest of the Government in the case.[22] On June 7, 1968, petitioner on his plea of *nolo contendere* was sentenced to imprisonment for a term of one to four years, but execution of that sentence was suspended, and he was placed on four years probation. He appealed this judgment to the Court of Appeals for the District of Columbia, which affirmed the judgment, without opinion (Appendix "C", *infra,* p. 33).

The purposeful campaign of the Government of harassment, oppression, contempt of the District Court's discovery orders and the deprivation of petitioner's constitutional rights is one of unparalleled brutality comparable to the actions of the Government in *In Petition of Provoo,* D. C. Md., 17 F. R. D. 183, 201, 1955, affirmed mem. *United States* v. *Proovo,* 350 U. S. 857, 1955 where you affirmed the order of the District Court dismissing the indictment where it had "found the delay 'caused by the deliberate act of the government' which the accused attempted to correct".[23] No other conclusion can be drawn other than the petitioner had his liberty extorted from him. The *nolo contendere* plea was a truce in a battle to enable the petitioner to seek appellate review of these constitutional ques-

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[22] This was not to be the case, however, since both the Securities and Exchange Commission and the Association of the Bar of the City of New York, who had been advised of the case by the Government are about to commence disciplinary proceedings against petitioner, which could lead to disbarment.

[23] *Pollard* v. *United States,* 352 U. S. at 362.

tions which the District Court resolved against him, "without being required to go through a futile trial on the merits".[24]

In *United States* v. *Ewell,* 383 U. S. 116, 122, 1966 you pointed out that the disappearance of evidence or witnesses, during the period of delay in bringing the defendants to trial would constitute such prejudice as to violate the defendants' rights to a speedy trial guaranteed by the Sixth Amendment.

The pattern presented in the instant case is very similar to that in *Dickey* v. *Florida,* 398 U. S. 30, 1970, wherein during the period of delay "for the convenience of the State" witnesses "died" and "became unavailable" and "police records" were "lost or destroyed". This Court unanimously reversed the subsequent conviction of the defendant and directed dismissal "of the charges on which that judgment was based" as a result of the prejudice to the defendant caused by the delay, which violated his constitutional right to a speedy trial. In *Dickey,* Mr. Chief Justice Burger speaking for the Court stated 398 U. S. at 38

> "* * * *. On this record the delay with its consequent prejudice is intolerable as a matter of fact and impermissible as a matter of law.
>
> "In addition to exerting every effort to require the State to try him, there is present in this record abundant evidence of actual prejudice to petitioner in the death of two potential witnesses, unavailability of another, and the loss of police records."

Can it be doubted that the death of three witnesses vital to petitioner's defense and the disappearance and destruction of the Government documents vital to petitioner's de-

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[24] 1 Wright, Federal Practice and Procedure, §175.

fense during the period between the ordering of a new trial by the Court of Appeals and the time that petitioner moved to dismiss the indictment on such grounds constituted such prejudice as to violate his constitutional right to a speedy trial under the Sixth Amendment?

In addition to the documents which were "destroyed" or "disappeared" the Government refused and failed to furnish to petitioner many documents which the District Court had ordered it to furnish to the petitioner, which the Government well knew contained evidence favorable to the petitioner, which was material to his guilt or innocence.[25] In *Brady* v. *State of Maryland*, 373 U. S. 83, 1963, you held that the suppression of such material evidence favorable to an accused violates due process irrespective of the good faith or bad faith of the Government. In *Brady*, Mr. Justice Douglas speaking for the Court stated 373 U. S. at 87:

> "We now hold that the suppression by the prosecution of evidence, favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

There can be no question that the acts of the Government in suppressing the documents in its possession which the District Court had ordered it to furnish to petitioner deprived petitioner of due process. All of the ingredients of the *Brady* holding are present in this case. The documents contained "evidence favorable to the accused", it was "suppress[ed] by the prosecution", it was "request[ed]" by the petitioner, the "evidence" which it contained was "material" "to the preparation of [petition-

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[25] See Footnote 18, *ante*, p. 17.

er's] defense"[26] and "irrespective" whether such suppression was as a result "of the good faith or the bad faith of the [Government]" petitioner was still deprived of due process.

Unquestionably, the delay of four years and three months in this case after the new trial had been ordered by the Court of Appeals, at which time petitioner could still not get a trial, violated and deprived him of his constitutional right to a speedy trial under the Fifth Amendment, in view of the fact that the delay resulted from the "purposeful and oppressive" acts of the Government,[27] in its failing to comply with the discovery orders of the District Court and furnish to petitioner evidence "material to the preparation of his defense",[28] three witnesses vital to his defense had died during such period of delay and many of the Government documents vital to his defense had "disappeared" or been "destroyed" during such period of time[29] and he had been denied due process as a result of "the suppression by the [Government] of evidence favorable" to him which the District Court had ordered it to produce and which the Court had found material to the preparation of petitioner's defense,[30] in addition to constituting harassment "by successive oppressive prosecutions" which this Court held in both *Gori* and *Downum*

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[26] Since Rule 16(b) requires "a showing of materiality to the preparation of [petitioner's] defense" (Appendix "A", *infra*, p. 26) the decision of Judge Matthews on petitioner's Rule 16(b) motion necessarily determined the "materiality" of such documents "to the preparation of [petitioner's] defense" as apparently required by the *Brady* rule.

[27] *Pollard* v. *United States*, 352 U. S. at 361.

[28] *Federal Rules of Criminal Procedure*, Rule 16(b).

[29] *Dickey* v. *Florida*, 398 U. S. at 36, 38; *United States* v. *Ewell*, 383 U. S. 122.

[30] *Brady* v. *State of Maryland*, 373 U. S. at 87.

violated the Double Jeopardy safeguards of the Fifth Amendment, all of which requires review and reversal of the judgment by this Court, since justice requires it.[31]

"On this record the delay with its consequent prejudice is intolerable as a matter of fact and impermissible as a matter of law."[32]

Any suggestion that petitioner's plea of *nolo contendere* waived his right to raise these substantial constitutional questions before this Court not only "runs counter to sound principles of judicial administration",[33] but conflicts with the recent holding of this Court in *McCarthy* v. *United States*, 394 U. S. 459, 466, 1969, where you pointed out that "[a] defendant who enters [a guilty plea] simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers." Chief Justice Warren writing for the Court was careful to point out that a guilty plea does not waive all constitutional rights, but only "several constitutional rights" and the rights that you specified which were waived are inherent in the plea itself ("privilege against self-incrimination") or in the fact that no trial is to be had ("right to trial by jury" and "right to confront his accusers"), but certainly such plea does not waive constitutional rights of which the defendant has already been deprived prior to the entry of the plea. The waiver is limited to constitutional rights to which the defendant would be entitled to assert upon a trial, which relate to

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[31] *Ashcraft* v. *State of Tennessee*, 322 U. S. 143, 1944, where you held 322 U. S. at 156 "[i]n disposing of cases before us it is our responsibility to make such disposition as justice requires."

[32] *Dickey* v. *Florida*, 398 at 38.

[33] 1 Wright, Federal Practice and Procedure, §175.

the trial itself, and not to constitutional rights of which he was deprived prior to the entry of the plea and unrelated to it, such as double jeopardy, failure to receive a speedy trial and due process, all of which constitutional rights petitioner was deprived of long before the entry of his plea of *nolo contendere.*

Conclusion

For the foregoing reasons a writ of certiorari should be granted in this case. The holdings below radically impair the constitutional guarantees against double jeopardy and of a speedy trial. The questions—with respect to the application of the Fifth Amendment's provision as to double jeopardy, the Sixth Amendment's right to a speedy trial and the effect upon appellate review of a *nolo contendere* or guilty plea entered after being deprived of these constitutional rights—are of great moment, have not previously been presented to this Court, and should be settled by it.

Dated: New York, New York
October 20, 1971

Respectfully submitted,

GABRIEL I. LEVY,
Attorney for Petitioner.

APPENDIX "A"

Statutes

28 U. S. C. §1254(1)

"Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

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18 U. S. C. §371

ACT OF JUNE 25, 1948, c.645, 62 Stat. 701.

§371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

FEDERAL RULES OF CRIMINAL PROCEDURE—RULE 16(b)

"Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies of portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable."

APPENDIX "B"

The Opinion of the Court of Appeals Reversing the Judgments of Conviction After the Second Trial

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17160

JOSEPH ABRAMS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

No. 17161

CHARLES GORDON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

No. 17162

JOHN GEORGE LEDES, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appendix "B"

Appeals from the United States District Court
for the District of Columbia

Decided January 2, 1964

Mr. Henry G. Singer, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Thurman Hill* was on the brief, for appellants in Nos. 17160 and 17161. *Messrs. Edward L. Carey* and *Walter E. Gillcrist* also entered appearances for appellants in Nos. 17160 and 17161.

Mr. Edward L. Carey, with whom *Mr. Walter E. Gillcrist* was on the brief, for appellant in No. 17162.

Mr. Kenneth E. Murphy, Attorney, Department of Justice, of the bar of the Supreme Court of Ohio, *pro hac vice*, by special leave of court, with whom *Messrs. David C. Acheson*, United States Attorney, and *Frank Q. Nebeker*, Assistant United States Attorney, were on the brief, for appellee.

Before FAHY, DANAHER and WRIGHT, *Circuit Judges*.

PER CURIAM: Appellants in these consolidated appeals are Joseph Abrams, Charles Gordon and John G. Ledes. They were indicted for and convicted of conspiracy in violation of 18 U.S.C. § 371. The alleged conspiracy, in brief, was that they and others had knowingly, willfully and unlawfully conspired to defraud the United States (a) concerning its right to have the business and affairs of the Securities and Exchange Commission administered free from self interest, bias and improper influence, more particularly with respect to matters and proceedings concerning several named companies including Bellanca Cor-

poration, and (b) concerning its right to the impartial, unbiased and conscientious actions and judgments of appellant Ledes as an employee of the Commission, free from corruption, partiality, improper influence, bias and dishonesty. It was alleged that as a part of the conspiracy he rendered improper assistance both to said companies in matters pending before the Commission and to appellant Abrams, who was a subject of investigation in regard to matters of the Bellanca Corporation pending before the Commission.

The trial in this case occupied the District Court for nearly a month. Scores of exhibits were introduced by both sides. We have carefully considered the entire record in our study of the several contentions for reversal, including a challenge to the indictment, a question of double jeopardy, the sufficiency of the evidence, and rulings upon the admission and exclusion of evidence. We find no basis for reversal except for the erroneous admission in evidence of Government Exhibit No. 14.

This exhibit is a typewritten order of the Commission entitled "In the Matter of Sydney L. Albert, Joseph Abrams, A. J. Gould & Co., Inc. [and] Bellanca Corporation," described on its face as an "Order Directing Investigation And Disignating Officers To Take Testimony." It bears date June 13, 1956. It recites that members of the Commission staff have reported to the Commission information tending to show that in connection with the affairs of Bellanca Corporation, Joseph Abrams, one of the appellants, and others, among other things had engaged in activities described as follows:

* * *

D. During the period from about March 1, 1955 to the date hereof, Sydney L. Albert, Joseph Abrams, A.

Appendix "B"

J. Gould & Co., Inc., and Bellanca Corporation in the offer and sale of the common stock of Bellanca Corporation, directly and indirectly, made to purchasers and prospective purchasers untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading concerning the ownership of the common stock of Bellanca Corporation being offered and sold by Sydney L. Albert.

E. During the period from about March 1, 1955 to the date hereof, Sydney L. Albert, Joseph Abrams, A. J. Gould & Co., Inc. and Bellanca Corporation, while engaged in the offer and sale of securities as described in Paragraphs A, B, C and D hereof, engaged in transactions, practices and courses of business which operate or would operate as a fraud or deceit upon purchasers of such securities. . . .

The document then states that if the information set forth is true it tends to show that the named persons and the Bellanca Corporation have violated various specified statutory provisions and also a specified Rule of the Commission, and in order to determine whether this has occurred an investigation is ordered.

From the foregoing it is obvious that the Exhibit makes serious charges of wrongdoing and unlawful conduct by Abrams in connection with Bellanca Corporation's problems with the Commission. The conduct referred to is stated to have occurred on or about March, 1955, and not later than June 13, 1956, the date of the Exhibit.[1] Objec-

[1] The charges in the indictment involve events beginning on or about May, 1957.

tions to the admission of the Exhibit were made by all appellants. It was error not to sustain these objections; for the Exhibit was not competent evidence. It contains ex parte, hearsay allegations or recitals of serious wrongdoing on the part of one of the co-conspirators in relation to matters which concerned the government agency around which the conspiracy revolved, especially with respect to one of the companies named in the indictment. The charges were highly prejudicial and we can think of no supportable theory for their competency as evidence at the trial. At an earlier stage of the prosecution in the District Court, when a mistrial was declared on a ground not now pertinent, the trial judge properly excluded the Exhibit, saying, "I will sustain the objection at this time to Government's Exhibit No. 14 because fundamentally of the statements contained therein which relate to charges and violations of other laws which I believe might be grounds for mistrial if they are introduced in evidence at this time." Not only so, but, as we have said, the statements were incompetent in any event since they were in the nature of unverified, ex parte, hearsay accusations. Even were the subject matter relevant to this trial the proof could not take this form. When later offered again toward the very end of the trial now before us the same judge was persuaded to admit the Exhibit on the theory it supported an allegation in the indictment that the Commission on or about June 13, 1956, was conducting an investigation with respect to trading in the securities market of the stock of the Bellanca Corporation. But, as appears from the excerpts above set forth, the contents of the Exhibit went far beyond evidencing that an investigation was conducted. Government counsel, moreover, urged its admissibility "also because of the fact that Mr.

Ledes intervened in this matter in connection with certain employees of the Commission." There was indeed testimony of such intervention regarding the Bellanca Corporation.

From the foregoing the prejudice to Abrams and Ledes seems clear; and since the verdict of the jury as to all three appellants was a general one which included Gordon, with no separate or special verdicts or findings as to the different facets of the cases,[2] we cannot safely surmise that the verdict against Gordon was uninfluenced by the prejudice to his alleged co-conspirators, Abrams and Ledes.

As to some suggestion by the Government that the contents of the Exhibit may not have become available to the jury, it was not admitted for the use of the court alone, unrelated to the issues to be decided by the jury. It was admitted without qualification or limitation and for the purpose of adding to the proof of the conspiracy. See *Leigh* v. *United States*, 113 U.S. App. D.C. 390, 308 F.2d 345 (1962).

Reversed and remanded.

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[2] Gordon was not brought into the Bellanca matter by the evidence.

APPENDIX "C"

Judgment of the Court of Appeals Affirming the Judgment of the District Court

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[no opinion]

No. 22,293

September Term, 1970.
Criminal 43-61.

JOHN GEORGE LEDES,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, McGOWAN and ROBINSON, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

Appendix "C"

ON CONSIDERATION OF THE FOREGOING, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

For the Court:

NATHAN J. PAULSON
Clerk

Dated: June 24, 1971.

Filed Jun 24 1971
NATHAN J. PAULSON
Clerk

APPENDIX "D"

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-291 October Term, 1971

JOHN GEORGE LEDES,

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 21, 1971.

/S/ W. E. B.
Chief Justice of the United States.

Dated this 14th
day of September, 1971